

DECISION



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THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-195009

DATE: March 5, 1980

MATTER OF: Alderson Reporting

DLG 64027

DIGEST:

Award may be made under ambiguous IFB where record shows that protester was not misled, Government's actual needs would be met, and other bidders would not be prejudiced.

[ALLEGATION THAT

Alderson Reporting (Alderson) protests the award of a contract for reporting and transcribing services to Ace-Federal Reporters, Inc. (Ace-Federal) under invitation for bids (IFB) No. D/L 79-7 issued by the Department of Labor (DOL). Alderson contends that the solicitation contained conflicting provisions with respect to whether the contractor would be permitted to sell copies of transcripts to the public, which substantially affected the firm's bid prices. For the reason set forth below, the protest is denied.

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Basis for Protest

The solicitation was issued on May 8, 1979. Article II, the "Schedule of Services/Prices," listed six items, A through F, each involving services for public hearings, conferences, or meetings in different locations, for which a bidder was to enter a price per transcript page; Article VIII gave estimated numbers of pages for each item. All item descriptions included a statement that copies of any transcripts prepared may be sold to the public. Bid prices were to be weighted according to prescribed factors correlating to the percentage of the total work that each item represented. The weighted prices were to be added together and award was to be made on the basis of the low "cumulative weighted price."

Alderson protests that Articles XIII and XIV of the IFB conflict with each other. The former provides:

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"Pursuant to Public Law 92-463 the Government reserves the right to make transcripts available to the public at the actual cost. Contractors may also sell copies of those transcripts which he is permitted to sell under Article II, herein, to the public provided that such copies are sold at a price which does not exceed the Government's price awarded for Additional Copies (Article 11.F.)."

However, Article XIV, entitled "SALES PRIVILEGE," states:

"If the contractor should furnish copies of transcripts of any kind to any person other than an official or employee of the Department of Labor he may be suspended in any case at the discretion of the Secretary of Labor, or by an officer authorized by the Secretary to do so."

Thus, it appears that the contractor may be "suspended" under Article XIV for engaging in the activity authorized by Article XIII.

#### DOL Position

DOL concedes that the two provisions conflict, and states that the prohibition in Article XIV was included in the IFB "by oversight." However, DOL does not believe that the deficiency warrants cancellation of the solicitation. DOL characterizes the matter as a "minor informality" that had no effect on the bid prices submitted by the protester or the other bidders.

Regarding the effect of the defect on Alderson, DOL suggests that Alderson "should have \* \* \* realized" that Article XIV was an "incorrect version" of an "almost identical" clause in another contract between the firm and DOL. That clause provides that the privilege of selling transcripts to the public may

be suspended at the discretion of the Secretary of Labor. DOL also notes that the day before bid opening Alderson was assured by the contracting officer that the inconsistency would be "remedied by an amendment" that presumably would "correct" the clause to read the same as does the one in Alderson's other contract. On these bases, the agency argues that the bid would not have changed had the solicitation been amended. In this connection, DOL also suggests that the protest evidences bad faith on Alderson's part in that the firm appeared to accept the above-mentioned assurance, waited a day, and then protested anyway.

DOL further suggests that it is "unlikely" that the conflicting provisions materially affected the other bidders. The basis therefore is the agency's view that even if Article XIV properly had addressed only the suspension of the privilege of selling, in view of that reservation of right by the Government and the fact that neither guaranteed nor estimated sales were stated in the solicitation, "any effort to bid for transcription services based upon expected revenue from sales [would have been] very risky."

#### Alderson Response

Alderson states that in submitting its bid it did not rely on the contracting officer's promise that Article XIV would be modified to allow the sale of transcripts without the threat of suspension. Rather, the firm states that it viewed the oral promise as "contrary to public policy and unenforceable." In this connection, Alderson points out that the IFB's Instructions and Conditions cautioned bidders that "Oral explanations or instructions given before the award of the contract will not be binding."

With respect to Alderson's other contract with DOL, Alderson states that it has numerous other such contracts, some of which state that sales of transcripts to the public are permitted unless prohibited, and others which state that the sales are prohibited unless permitted; Alderson contends that the difference

is significant when calculating a bid price, and that it had no way of knowing which was intended here by DOL.

Regarding DOL's speculation that the consideration of the revenue to be derived from possible sales in any case would be "very risky" and thus not an appropriate factor in bid calculation, Alderson notes that Ace-Federal bid \$.35 less per page for item B (which comprised 91 percent of the requirement) than it did in 1978 when it won that competition; the protester suggests that Ace-Federal's 1979 bid is a below-cost one that will be "subsidized" by transcript sales to the public, which Ace-Federal as the incumbent contractor is in a good position to estimate. Alderson further argues that "it borders upon the ridiculous to state that because \* \* \* [considering revenue from sales to the public in bid computation] is risky one does not take such matters into account in putting together a bid."

### Discussion

DOL essentially is correct that not every defect in a solicitation (e.g., a "minor informality") warrants cancellation. The rejection of all bids after opening tends to discourage competition because it publicly discloses bids without award and causes bidders to have expended manpower and money in bid preparation without the possibility of acceptance. 52 Comp. Gen. 285 (1972). It is primarily for these reasons that the procurement regulations require that a "compelling reason" exist for cancellation. 41 C.F.R. §-2.404(a) (1979); A&C Building and Industrial Maintenance Corporation, B-193047, April 13, 1979, 79-1 CPD 265, at p. 11. Accordingly, the cancellation of a defective solicitation may not be appropriate if award would (1) serve the Government's actual needs, and (2) would not adversely affect the competition to prejudice the other bidders. Ingersoll-Rand Company, B-192279, October 6, 1978, 78-2 CPD 258; Tri-Com, Inc., B-186429, November 10, 1976, 76-2 CPD 398.

Despite Alderson's assertion that its bid reflected the firm's concern with suspension under Article XIV, we note that in a letter of protest to the contracting officer submitted shortly before bids under the IFB were opened and the instant protest filed in our Office, Alderson stated that "[t]he basis for its [Alderson's] bid is the oral assurances from the Contracting Officer that the contract will be amended to omit the provisions of \* \* \* [Article] XIV." In view thereof, we must conclude that in calculating the bid Alderson in fact took into consideration anticipated revenue from the sale of transcripts to the public, thereby competing on a common basis with Ace-Federal.

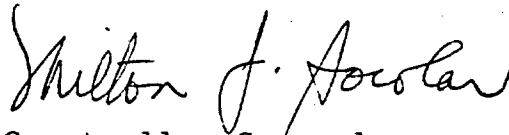
Accordingly, and although it would have been advisable to correct Article XIV before bid opening (see 41 C.F.R. § 1-2.207), we cannot find that the defect prejudiced Alderson in the competition. Since no other bidder has protested the matter, and since it is not disputed that award to Ace-Federal will meet the Government's needs, in our view there does not exist a "compelling reason" under the regulations to cancel the solicitation. The protest is denied.

We note here that in its report DOL suggests that the protest has placed the agency in the untenable position "of not being able to make award \* \* \* [which] has seriously deprived [DOL] \* \* \* from having reporting services on a truly competitive basis." However, we point out that Alderson did raise the matter with the contracting officer one day before bids were to be opened, and that in any event the timing of the protest conforms to the requirements of our Bid Protest Procedures, 4 C.F.R. § 20.2(b) (Procedures).

Further, the protest was filed in our Office on May 30, 1979, and on June 6 we requested DOL to submit a report on the matter within 25 working

days, in accordance with section 20.3 of our Procedures. That provision reflects both what we consider to be a sufficient period for the preparation of a report, and our concern that the expeditious handling of bid protests is indispensable to the orderly process of Government procurement and to the protection of protesters and other parties. Wheeler Industries, Inc., B-193883, July 20, 1979, 79-2 CPD 41.

However, the report was not submitted until seven months later, for which DOL has offered no explanation. Thus, in our view any prejudice to DOL by the protest primarily has been caused by the agency itself. Accordingly, we are bringing the matter to the attention of the appropriate DOL officials. AMF Incorporated Electrical Products Group, 54 Comp. Gen. 978, 987 (1975), 75-1 CPD 318; Leasco Information Products, Inc., et al., 53 Comp. Gen. 932, 949 (1974), 74-1 CPD 314.



FOR THE Comptroller General  
of the United States